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No. _____

In The
Supreme Court of the United States

CHRISTOPHER PAUL CASSELL, M.D.,
Petitioner,

v.

PAUL KURILY; DELORES KURILY,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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159 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is ability to pay a consideration for dismissal of a Chapter 7 bankruptcy petition under 11 U.S.C. 707(a), **Apdx. E**?

2. Is there a bad faith standard to 11 U.S.C. 707(a), **Apdx. E**, which permits dismissal of a Chapter 7 bankruptcy petition for other than procedural reasons?

LIST OF PARTIES TO THE PROCEEDINGS

Christopher Paul Cassell (Debtor),

Plaintiff-Appellant

Paul Kurily and Delores Kurily,

Defendants-Appellees.

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OPINIONS BELOW

The Bankruptcy Court in an unpublished opinion determined that it could find cause for dismissal of a Chapter 7 Bankruptcy Petition, and apply 11 U.S.C. 707(a), **Apdx. E,** to grant a dismissal generally utilizing a "smell test".

The Trial Court made a finding that a debtor who has no ongoing unsecured debt due to regular payment of bills as they occur in the ordinary course of personal and business financial affairs, acts in bad faith by seeking to discharge a single large negligence judgment. This ruling would have the effect of finding that incurring a large unsecured debt through negligence is indicia of bad faith. This would set a jurisdictional standard not currently within the parameters of 11 U.S.C. 109, **Apdx. C.**

The court also used several factors such as failing to reduce expenditures and continued "lavish" lifestyle, many of which are simply different ways of saying ability to repay, as evidence of bad faith.

The District Court adopted the same findings and affirmed the dismissal.

The Sixth Circuit applied the same factors and affirmed the dismissal.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals decided this case on September 29, 2000. The decision appears to conflict with decisions on the same issue in the Eighth Circuit (Huckfeldt, 39 F3d 829 [1994]), the Ninth Circuit (Padilla, 222 F3d 1184 [2000]), and the Fourth Circuit (Green, 934 F2d 568 [1991]), the decisions all applying different standards, thus creating a conflict among the Circuits.

The Petition for Writ of Certiorari is timely filed within 90 days of the decision of the Sixth Circuit.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. 109 . . . . . **Apdx. C**

11 U.S.C. 523 . . . . . **Apdx. D**

11 U.S.C. 707(a)(b) . . . . . **Apdx. E**

11 U.S.C. 727 . . . . . **Apdx. F**

11 U.S.C. 1129 . . . . . **Apdx. G**

11 U.S.C. 1225 . . . . . **Apdx. H**

11 U.S.C. 1325 . . . . . **Apdx. I**

28 U.S.C. 157(a) . . . . . **Apdx. J**

28 U.S.C. 1334(b) . . . . . **Apdx. K**

STATEMENT OF CASE

This is a civil proceeding arising under Title 11 of the United States Code. The District Court of this District has jurisdiction of this proceeding under 28 U.S.C. §1334(b), **Apdx. K.** Pursuant to 28 U.S.C. §157(a), **Apdx. J,** and E.D. Mich. LR 83.50(a)(1), **Apdx. M,** this proceeding was referred to the Bankruptcy Judges.

Appellate jurisdiction in the U.S. District Court was established under Bankruptcy Rule 8001, **Apdx. L,** and was an appeal of right.

Appeal to this Court is taken from a final Judgment in a civil case, the Sixth Circuit Court ruling, **Apdx. A,** affirming Opinion and Order of Judge Borman, **Apdx. B,** in the U.S. District Court, Eastern District of Michigan, Southern Division.

The genesis of the case is a creditors motion to dismiss a Chapter 7 Bankruptcy petition through the use of 11

U.S.C. 707(a), **Apdx. E,** which provides for dismissal for cause. The motion attempted to create a good faith test. The good faith test was created by claiming ability to pay a large negligence judgment from exempt assets.

The debtor in this case is a debtor, who during the malpractice insurance crisis in the 1980's made a decision in accord with a consultation with his business and estate planning attorney, to operate without malpractice insurance.

At the time of this decision, the debtor was paying all bills current, a circumstance which continued to the time his bankruptcy petition was filed. The debtor's only assets over and above his ability to earn, were exempt real property, an exempt pension plan and miscellaneous personal property.

The asset status had not changed as of the filing of the Bankruptcy Petition which is the subject of this appeal.

In the late 1990's the debtor suffered a malpractice judgment as a result of a jury verdict finding negligent performance of a medical procedure.

The debtor then filed a Chapter 13 Bankruptcy Petition which was dismissed on a finding that the debt limitations exceeded jurisdictional limits. Subsequent thereto, the instant Chapter 7 Petition from which this appeal arises, was filed.

The Chapter 7 case was dismissed, based upon a finding of bad faith. The bad faith ruling was generated from factors which, although stated in different terms, all relate to perceived ability to pay.

ARGUMENT

IS ABILITY TO PAY A CONSIDERATION FOR DISMISSAL OF A CHAPTER 7 BANKRUPTCY PETITION UNDER 11 U.S.C. 707(a), **Apdx. E,**?

IS THERE A BAD FAITH STANDARD TO 11 U.S.C. 707(a), **Apdx. E,** WHICH PERMITS DISMISSAL OF A CHAPTER 7 BANKRUPTCY PETITION FOR OTHER THAN PROCEDURAL REASONS?

The Appellees-creditors in this case brought a motion to dismiss under 11 U.S.C. 707(a), **Apdx. E,** alleging that the court should dismiss the petition for bad faith, resulting from *inter alia*, the ability to pay the judgment.

Jurisdiction for a Chapter 7 Bankruptcy Petition arises under 11 U.S.C. 109, **Apdx. C**. This section provides no limitations or requirements for a specific number of creditors or specific amount of debt.

There are specific good sections dealing with good faith in other chapters of the Bankruptcy Code, for instance, 11 U.S.C. 1129, **Apdx. G,** 11 U.S.C. 1225 (now expired), **Apdx. H,** and 11 U.S.C. 1325, **Apdx. I**. Each of these sections relates to a scenario where there is to be an ongoing relationship with creditors, in short a reorganization.

Statutory construction and application has generally mandated that specific statutes would take precedent over general statutes. Thus, it would appear that 11 U.S.C. 523, **Apdx. D,** 11 U.S.C. 727, **Apdx. F,** and 11 U.S.C. 707(b), **Apdx. E,** would take precedent over 11 U.S.C. 707(a), **Apdx. E**. See In re: Padilla, 222 F3d 1184 (9th Circuit 2000).

The question thus is, does 11 U.S.C. 707(a), **Apdx. E,** which permits dismissal for cause include within its parameters

the notion of ability to pay and a good faith test?

Where the circuits have ruled, they have created a nebulous screen which indicates a need for clarification.

The Sixth Circuit in Zick, 931 F2d 1124 (1991) perceives a standard to be used in egregious cases where there is an intent to avoid a large single debt arising from conduct akin to fraud, misconduct, or gross negligence. Even then, factors which it suggests are to be applied are based on ability to repay, a factor most courts consider inappropriate under 11 U.S.C. 707(a), **Apdx. E**.

The Fourth Circuit in Green, 934 F2d 568 (1991) appears to take the position that bad faith may be considered only under 11 U.S.C. 707(b), **Apdx. E**.

The Eighth Circuit in Huckfeldt, 39 F3d 829 (1994) set forth positions critical of Zick, supra, and adopted

positions set forth in Khan, 172 Bankruptcy 163 (Bkr. D. Minn 1994). This position finds that use of a dismissal under 11 U.S.C. 707(a), **Apdx. E,** should be extremely limited and must not be applied on any ability to pay factors, not in circumstances where the debtor is merely taking advantage of legal rights and possibly not at all where the debtor is willing to surrender all non-exempt assets to a liquidation proceeding.

The court also notes that framing issues under U.S.C. 707(a), **Apdx. E,** as bad faith may misdirect from the fundamental principals and purposes of Chapter 7.

The Ninth Circuit in Padilla, 222 F3d 1184 (2000) found that bad faith as a general proposition does not provide cause to dismiss a Chapter 7 petition under 11 U.S.C. 707(a), **Apdx. E.** The court noted that the "for cause" standard

did not impose a good faith standard as did Chapter 11 and 13 and that a 707(a), **Apdx. E,** review is more properly reviewed by reference to the specific code sections providing for non-dischargeability as to a specific debt or en toto.

It appears from these cases that there is conflict among the Circuits as to whether good faith is grounds for dismissal under 11 U.S.C.A. 707(a), **Apdx. E**. There is also an apparent conflict as to whether part of the inquiry under 707(a), **Apdx. E,** may have to do with ability to pay. Whether it is to be admitted or not, factors such as: failure to adjust life style, sufficient resources to pay his debts, or lavish lifestyle, all relate to ability to repay.

What is the actual rule? Is there a good faith requirement under 11 U.S.C.

707(a), **Apdx. E,** where the debtor submits all his non-exempt assets for liquidation? Is there a good faith inquiry open where a debtor merely takes advantage of legal rights? Is 707(a), **Apdx. E,** to be used in lieu of 11 U.S.C. 523, **Apdx. D,** 727, **Apdx. F,** or 707(b), **Apdx. E,** or did congress speak specifically to issues of non-dischargeability by placing those specific statutes in place? Does 11 U.S.C.A. 707(a), **Apdx. E,** relate specifically to procedural issues as the legislative history in enacting 11 U.S.C.A. 707(b), **Apdx. E,** and the inclusion of specific non-dischargeability provisions in the Code would suggest.

It appears that the Circuits are clearly in conflict over these questions and specifically over the applicability of 11 U.S.C. 707(a), **Apdx. E.**

It is Appellant's belief that the parameters of 11 U.S.C. 707(a), **Apdx. E,** have been exceeded in this cause.

Appellant further believes that this is the type of hyperbole that is to be avoided. As was noted by the case of Peters, 91 BR 401 (1988) in quoting Sutherland:

> . . . The basic principal of judicial restraint in statutory interpretation is deceptively simple: stay close to the statutory language. If the statutory language is clear and the result of a literal interpretation does not seem to be one completely unanticipated by the legislature, then relying on the language of the statute is relatively uncontroversial...

Here, the specifics included in the Bankruptcy Code show no unanticipated result. As such, it appears that Padilla, 222 F2d 1184 (2000) got it right.

It appears that the other Circuits may have entered the statutory

construction abyss that Justice Frankfurther warned of when he was commenting on statutory construction:

> ...The purpose of construction being the ascertainment of meaning, every consideration brought to bear for the solution of that problem must be devoted to that end alone. To speak of it as a practical problem is not to indulge a fashion in words. It must be that, not something else. Not, for instance, an opportunity for a judge to use words as 'empty vessels into which he can poor anything he will' -- his caprices, fixed notions, even statesman like beliefs in a particular policy. Nor on the other hand, is the process a ritual to be observed by unimaginative adherence to well-worn professional phrases.
>
> Justice Felix Frankfurther, Some Reflections on the Reading of Statutes, 47 Col.L.Rev. 527 (1947).

SUMMARY

To recapitulate, the parameters of 11 U.S.C. 707(a), **Apdx. E,** have been exceeded in this case. The confusion among the circuits is evident.

It would appear that applicability of 11 U.S.C. 707(a), **Apdx. E,** has undergone a metamorphoses not intended by congress.

As such, the Circuit conflict resolution by this United States Supreme Court is appropriate in this case.

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

№. 99-1927

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: CHRISTOPHER PAUL CASSELL, M.D.
Debtor.

_____/

CHRISTOPHER PAUL CASSELL, M.D.
Plaintiff-Appellant,

v.

PAUL KURILY; DELORES KURILY
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

MEMORANDUM OPINION

BEFORE: NORRIS and DAUGHTREY, Circuit Judges; WISEMAN, District Judge[1]

PER CURIAM. Christopher Paul Cassell appeals from an order of the district court which affirmed an order of the

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[1]The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

bankruptcy court dismissing his Chapter 7 petition for bankruptcy. Both courts concluded that the petition was filed in bad faith and should be dismissed, citing as authority our opinion in *Industrial Ins. Servs., Inc. v. Zick*, 931 F.2d 1124 (1991).

Having had the benefit of oral argument and having carefully considered the record on appeal, the briefs of the parties, and the applicable law, we are not persuaded that the bankruptcy court erred in dismissing the petition.

Because the reasoning which supports the dismissal has been articulated by the bankruptcy and district courts, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the dismissal is affirmed upon the reasoning

employed by the bankruptcy court in its opinion dated January 6, 1999, and by the district court in its opinion dated August 13, 1999.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

№. 99-1927

Filed: October 23, 2000

In Re: CHRISTOPHER PAUL CASSELL, M.D.
Debtor.

_____/

CHRISTOPHER PAUL CASSELL, M.D.
Plaintiff-Appellant,

v.

PAUL KURILY; DELORES KURILY
Defendants-Appellees.

MANDATE

Pursuant to the court's disposition that was filed 9/29/00 the mandate for this case hereby issues today.

True Copy.

COSTS: NONE

Attest:

Filing Fee.....$
Printing.....$

Total.....$

_____
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: CHRISTOPHER PAUL CASSELL, M.D.
Debtor.
_____/

CHRISTOPHER PAUL CASSELL, M.D.
Plaintiff-Appellant,

v.

PAUL KURILY; DELORES KURILY
Defendants-Appellees.
_____/

Case Number: 99-70200

JUDGE PAUL D. BORMAN
UNITED STATES DISTRICT COURT

OPINION SUPPLEMENTING AUGUST 4,1999 ORDER THAT AFFIRMED THE BANKRUPTCY JUDGE'S DISMISSAL OF THE CHAPTER 7 PETITION AND BARRED PETITIONER FROM FILING A NEW PETITION WITHIN 180 DAYS.

On August 4, 1999, the Court issued an Order Affirming the January 6, 1999 order entered by Bankruptcy Judge Walter Shapero. This opinion sets forth the Court's reasons for **AFFIRMING** Judge

Shapero's order which Dismissed with Prejudice the Appellant's Chapter 7 petition for bankruptcy and Barred the Appellant for refiling a new bankruptcy petition for 180 days.

I.

FACTS:

As stated in the January 6, 1999 bankruptcy court order, Appellant is a board certified general surgeon who has been in private practice for twenty years, the last fifteen as a sole practitioner. Appellant currently has staff privileges in two different hospitals and his patients primarily come from other doctors' referrals at those hospitals. Appellant's income derives from third-party insurance companies, who reimburse Appellant for surgical procedures that he performs.

In 1990 and 1991, Appellant chose to work without medical malpractice insurance coverage. Appellant stipulated that this decision was a business calculation, which he had made after deciding that insurance was too expensive to carry. This calculation proved to be erroneous, as on December 10, 1992, Appellees Paul and Dolores Kurily sued Appellant in Macomb County Circuit Court for medical malpractice. After Appellant rejected a proposed mediation award of $100,000, which Appellees had accepted, the case proceeded to trial. On June 25, 1996, the court entered a final judgment based upon a jury verdict against the Appellant in the amount of $240,000 plus interest and costs; Appellant did not appeal this judgment.

After obtaining their judgment, Appellees attempted to enforce it. They garnished several insurance companies that reimbursed Appellant and collected approximately $18,000 pursuant to those writs; currently these funds remain in an escrow account held by the trustee. According to Appellant, this garnishment eliminated his cash flow and impeded his ability to practice medicine. He, therefore, filed his first voluntary Chapter 7 petition for bankruptcy on July 29, 1996.

In his initial § 341 hearing, Appellant stipulated that his sole reason for filing his petition was this adverse judgment. At that hearing, he testified that he had made no effort to pay any portion of his debt to Appellees, and that he had no intention of doing so:

Question: Okay. And have you made any efforts to pay [Appellees]?

Answer: No.

Question: Do you intend to?

Answer: No.

Question: Isn't that why you filed bankruptcy in the first place, Dr. Cassell?

Answer: Of course.

Question: Because you don't want to pay them, correct?

Answer: Absolutely.

Question: So whatever the Kurilys do to collect, you'll respond by filing a bankruptcy; correct?

Answer: Well, that's what we did.

Question: You still have no intention of paying them?

Answer: That's right.

(Appellees Exh. 11; Tr. 10-29-97, at 29, lines 5-16; at 30 lines 2-6)

On October 11, 1996, the Chapter 7 trustee initiated an adversary proceeding against the Appellant to recover certain properties, including accounts receivable that the Appellant had used to pay post-petition expenses. Prior to any ruling upon the trustee's motion, Appellant converted his Chapter 7 petition to a Chapter 13 one, which mooted the trustee's actions.

Upon Appellees' motion, however, the bankruptcy court dismissed Appellant's Chapter 13 petition. The bankruptcy court found that Appellant's non-contingent, liquidated, unsecured debt exceeded the statutory limit of $250,000, and therefore, the bankruptcy court determined that Appellant was ineligible to proceed under Chapter 13. Appellant appealed that ruling to this Court, and

on April 21, 1997, this Court issued an order affirming the bankruptcy court's ruling.

On September 12, 1997, Appellant filed his second Chapter 7 petition for relief. Appellees moved to dismiss, arguing that the Appellant had filed in bad faith. On January 7, 1999, the bankruptcy court granted Appellees' motion.

The bankruptcy court noted that Appellees were the Appellant's only unsecured creditors and went on to make several findings as to Appellant's assets. The court found, *inter alia*, that Appellant jointly owns with his wife a residence that a seven-year old appraisal valued at approximately five hundred thousand dollars-- a home equity lien for sixty-five thousand dollars

exists on the property. Further the Court found that the Appellant had purchased two condominiums: one in Ann Arbor, approximately seven years ago, and the other in Grosse Pointe, approximately eleven years ago, which was titled in his wife's name. Appellant continues to make payments on the Grosse Pointe condominium, which amount to $736 per month. Further, Appellant listed $313,200 in personal property in his Schedule B, including a profit sharing pension plan, clothing, accounts receivable, office equipment, and an unknown amount of household goods and furnishings.

The parties stipulated that Appellant failed to include two assets in his Chapter 7 schedule. First, Appellant failed to list his interest in a $500,000 life insurance policy that names his

Revocable Living Trust as his beneficiary. Further, Appellant failed to list his interest in that Trust as an asset.

The bankruptcy court also examined Appellant's expenses. First, the bankruptcy court noted that Appellant took six vacations in 1996 and similar trips in 1997. These trips included: a two-week African safari that cost between four and five thousand dollars; a trip to the Cayman Islands where the Appellant spent one week attending a medical conference and then stayed a second week for vacation; an Idaho elk hunting vacation with his daughter; and a trip to Kansas City, which Appellant claimed was to care for a brother who had suffered a heart attack. Further, the bankruptcy court noted that Appellant had sold his

two vehicles immediately prior to filing his second petition, and instead, Appellant leased two automobiles: a BMW for which the Appellant pays $738 per month; and a Mercury Sable for which Appellant prepaid the $9,288 lease.

In addition, both the Appellant and Appellees called expert witnesses to discuss appellant's income and expenses. Appellant's expert, calculated that Appellant's average yearly income over a seven year period was $280,000, but noted that Appellant's income had fallen dramatically after 1995. The bankruptcy court noted, however, that on cross-examination, Appellees' attorney brought out that this decrease was largely due to a voluntary cessation on taking call and taking on new patients for a period of three months. Appellant's expert

calculated Appellant's business expenses averaged $121,000 per year, but noted that they have increased in recent years because of legal fees defending the malpractice suit and maintaining the bankruptcy proceedings.

Appellees' expert testified that he had difficulty in calculating Appellant's finances because of a lack of documentation supporting disbursements. Despite this difficulty, however, Appellees' expert calculated that Appellant had a discretionary income- income that was available to Appellant after paying all business and household expenses- of $60,000 per year.

After the parties attempted a second mediation and failed to agree, the bankruptcy court addressed the merits of Appellees' motion to dismiss the petition

for cause, pursuant to 11 U.S.C. § 707(a). The bankruptcy court applied fourteen factors and found that Appellant's petition was a bad faith filing. The bankruptcy court dismissed Appellant's petition and barred Appellant from filing a further petition for 180 days unless Appellant showed a substantial change in circumstances prior to that time.

II.

On January 6, 1999, the bankruptcy court dismissed Appellant's second voluntary Chapter 7 petition for bankruptcy, finding that the Appellant had filed his petition in bad faith. Appellant has requested this Court to overturn that decision, and has argued two issues on appeal: first, that the facts are insufficient to support a finding of bad

faith; and second, that the bankruptcy court improperly based its decision upon Appellant's ability to repay the debt. Put another way, Appellant argues that the bankruptcy court used the wrong factors in its analysis and then improperly applied the facts to those factors. Neither of Appellant's arguments have merit, and the Court **AFFIRMS** the bankruptcy court opinion which dismisses Appellant's Chapter 7 petition.

Standard of Review

In this case, Appellant has requested the Court to review the bankruptcy court's decision to dismiss his Chapter 7 petition pursuant to 11 U.S.C. § 707(a). Such a decision is based upon equitable principles and therefore "will be reversed only for abuse of discretion." *Industrial Ins. Sen's. v.*

Zick (In re Zick), 931 F.2d 1124, 1126 (6th Cir. 1991). The Second Circuit has explained that "[a]n abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous." *In re Hillsborough Holdings Corp.*, 127 F.3d 1398, 1401 (2d Cir. 1997) (quoting *In re Red Carpet Corp. of Panama City Beach*, 902 F.2d 883, 890 (11th Cir. 1990)).

Good Faith Filing Requirement

The bankruptcy court dismissed Appellant's Chapter 7 petition finding that it did not meet the Good Faith Filing Requirement (GFFR). The GFFR is a judicial construct based upon an interpretation of 11 U.S.C. § 707(a) and general equity principles of bankruptcy

law. The statute permits a bankruptcy court, after notice and hearing, to dismiss a case for cause, "*including*--(1) unreasonable delay by the debtor that is prejudicial to creditors; (2) non-payment of any fees or charges required under chapter 123 of title 28; and (3) failure of the debtor in a voluntary case to file... the information required by paragraph (1) of section 521." 11 U.S.C. § 707(a) (emphasis added). While the statute does not mention "good faith" as a basis to dismiss a petition for cause, the statute's use of the term, "including," indicates that the list is nonexclusive. As a result, several courts, including the Sixth Circuit, have interpreted the statute as permitting a bankruptcy court to dismiss a petition

when it finds that the petition was not filed in good faith.

The Sixth Circuit addressed the good faith filing requirement in *Industrial Ins. Servs. v. Zick (In re Zick)*, 931 F.2d 1124, 1126 (6th Cir. 1991). There, debtor was a former employee of an insurance company, who left the company to start his own business. He solicited his former clients to transfer their business to his new company, and his former employee sued and received a six hundred thousand dollar judgment against him. Debtor filed for Chapter 7 bankruptcy relief and his creditor moved to dismiss the petition for lack of good faith, which the bankruptcy court granted.

The Sixth Circuit affirmed the bankruptcy court's dismissal of the

petition, finding that lack of good faith was an appropriate basis to dismiss a Chapter 7 petition, pursuant to 11 U.S.C. § 707(a). The court examined the statute and determined that its list of potential bases to dismiss for cause was not exclusive. *See id.* at 1126. It noted that many courts had accepted a lack of good faith as a valid cause of dismissal under that statute. *See id.* at 1127. Further, the court stated that good faith was a jurisdictional requirement, which is inherent in the purposes of bankruptcy relief[1]. *See id.* at 1129.

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[1]In the case at bar, Appellant has noted that the *Zick* opinion has been criticized by other opinions, including *In re Huckfeldt*, 39 F.3d 829 (8th Cir. 1994). There, the Eighth Circuit examined the *Zick* opinion and rejected the conclusion that the statute permitted a court to impose a good faith filing requirement. While Appellant argues that the Supreme Court may choose to grant certiorari to resolve this disagreement,

Factors to Determine Whether Good Faith Existed

Since the Sixth Circuit has determined that a GFFR does exist in this circuit, the next step is to define the actual concept of good faith. This is not an easy task, however, as several courts have taken different positions on the issue. Some courts have adopted a broad definition of good faith, while others take a much more narrow approach, holding that only actual fraud or misrepresentation will constitute a lack of good faith. The Sixth Circuit seems to have adopted the former approach.

In *Zick*, the Sixth Circuit explained that dismissal for a lack of good faith

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the Supreme Court has not yet done so. The Sixth Circuit's opinion in *Zick* therefore, is binding precedent governing this issue, and the good faith filing requirement exists in this circuit.

is highly fact specific and is "undertaken on an *ad hoc* basis." *Zick*, 931 F.2d at 1129. While the court cautioned that such dismissal should be confined to egregious cases, it noted that "[t]he facts required to mandate dismissal based upon a lack of good faith are as varied as the number of cases.'" *Id.* at 1127. The Sixth Circuit adopted a "smell test" to determine when a lack of good faith exists; the bankruptcy judge should rely upon intuition and knowledge of the case to determine whether something appears wrong with the debtor filing for bankruptcy.[2]

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[2]The "smell test" was delineated in *Morgan Fiduciary v. Citizens and Southern Int'l. Bank*, 95 B.R. 232, 234 (S.D. Fla. 1988), where the court referred to a comment by the late Professor Irwin Younger. The court stated "the most important item in the courtroom and all too seldom used is the judge's nose. Any trial judge will inevitably come to the conclusion on occasion that a certain case or claim or defense has a bad odor.

Using this "smell test," the Sixth Circuit analyzed and approved the factors that the bankruptcy court had employed in dismissing the case for lack of good faith. Those factors included: (1) the debtor's manipulations which reduced the creditors in this case to one; (2) the debtor's failure to make significant lifestyle adjustments or efforts to repay; (3) the fact that the petition was filed clearly in response to ILS' obtaining a mediation award; and (4) the unfairness of the debtor's use of Chapter 7 under the facts of this case." *Zick*, 931 F.3d at 1128. According to the Sixth Circuit, the bankruptcy court did not abuse its discretion in applying these factors to find that the debtor had not

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Simply put, a matter smells. Some smell so bad they stink."

acted in good faith when he filed his petition.

A bankruptcy court in the Western District of Kentucky has offered further guidance in applying the Sixth Circuit's smell test. In the case of *In re Spagnolia, M.D.* 199 B.R. 362 (W.D. Ky. 1995), the bankruptcy court dismissed debtors' Chapter 7 petition after finding that they had filed in bad faith. There, debtors were both physicians, who were married to each other. They had been found liable in a state court proceeding for the damage that their two dogs had caused when they attacked a United Parcel Service employee. The jury awarded $500,000 in damages and the debtors filed for Chapter 7 relief.

Relying on *Zick* and other recent cases, the bankruptcy court compiled a

list of fourteen factors that it used to analyze whether debtors had filed in good faith. These factors included whether:

1. The debtor reduced his creditors to a single creditor in the months prior to filing the petition.
2. The debtor failed to make lifestyle adjustments or continued living an expansive or lavish lifestyle.
3. The debtor filed the case in response to a judgment pending litigation, or collection action; there is an intent to avoid a large single debt.
4. The debtor made no effort to repay his debts.
5. The unfairness of the use of Chapter 7.
6. The debtor has sufficient resources to pay his debts.
7. The debtor is paying debts to insiders.

8. The schedules inflate expenses to disguise financial well-being.

9. The debtor transferred assets.

10. The debtor is over-utilizing the protection of the Code to the unconscionable detriment of creditors.

11. The debtor employed a deliberate and persistent pattern of evading a single major creditor.

12. The debtor failed to make candid and full disclosure.

13. The debts are modest in relation to assets and income.

14. There are multiple bankruptcy filings or other procedural "gymnastics."

Id. at 365. The bankruptcy court noted that while the presence of only one factor would not be sufficient to find a lack of good faith under § 707(a), a combination of those factors will warrant dismissal of the petition. *See id.* at 365. The court then went on to find that

eight factors were present in that case, and it dismissed the petition.

In the case at bar, the bankruptcy court applied the fourteen factors used in *Spagnolia* to determine whether Appellant had filed his petition in good faith. While Appellant argues that the bankruptcy court improperly considered his ability to repay the debt, his argument lacks merit. Appellant argues that 11 U.S.C. § 707(a) and the legislative history associated with that statute preclude any consideration of the Appellant's ability to pay his debt.

In support, Appellant relies on two different types of authorities. First, he has cited to the court several cases that discuss statutory interpretation and the propriety of judicial activism, including references to Justices Frankfurter and

Scalia. (*See, e.g.*, Appellant Br. pp. 12-15) Appellant argues that since § 707(b) specifically refers to an ability to pay, while § 707(a) conspicuously lacks such language, consideration of this factor is inappropriate. In addition, Appellant relies upon legislative history stating that § 707(a) was not intended as a means for examining a debtor's ability to repay his debt as that would result in transforming every Chapter 7 petition relief into a mandatory Chapter 13 petition.

Appellant's argument, however, ignores the Sixth Circuit's opinion in *Zick*, which approved a bankruptcy court's use of the debtor's ability to repay his debt as one factor in determining whether the petition was filed in good faith. In *Zick*, the Sixth Circuit specifically held

that the bankruptcy court's finding that "the debtor's failure to make significant lifestyle adjustments or efforts to repay," was an appropriate factor in its determination. *See Zick*, 931 F.2d at 1127. Further, the Sixth Circuit cited as support for its decision a bankruptcy court opinion where the ability to repay the debt through a lifestyle adjustment was explicitly relied on in dismissing the case for lack of good faith. *See id.* at 1128 (citing *In re Brown*, 88 B.R. 280 (Bankr.D.Hawaii 1988)).

In the case at bar, the bankruptcy court was particularly cautious in examining the debtor's ability to repay his debt. The bankruptcy court stated that it was acting carefully as to not overly weigh that factor, but rather the bankruptcy court balanced it with all the

other factors that it had examined. (*See* Bankruptcy Opinion p. 18) The Sixth Circuit's opinion in *Zick* supports the bankruptcy court's use of the debtor's ability to pay his debt as one factor in its examination of the totality of the circumstances. The Court finds that the bankruptcy court did not abuse its discretion in examining the Appellant's ability to repay his debt as one of many factors in determining whether Appellant had the requisite good faith in filing his petition.

Sufficient Facts Supporting Bankruptcy Court's Determination

Appellant further has argued that the bankruptcy court erred in determining that the facts in this case support a finding that the Appellant lacked good faith in filing his petition. While he does not dispute the bankruptcy court's

finding as to the existence of those facts, he argues that they are not indicative of bad faith. Appellant is in error.

Appellant spends several pages of his brief discussing several facts that the bankruptcy court found relevant to its determination that the petition had been filed in bad faith. For example, the Appellant argues that his trip to Africa is not indicative of a lavish lifestyle, noting that "[p]eople spend more than that doing [sic] to Disney World." (*See* Appellant Br. p. 10) He further argues that the Appellant's lease of a BMW is a luxury, but is merely three to four hundred dollars more than an average person's monthly budget for a car payment. (*See* Appellant Br. p.8)

Appellant's argument lacks merit. The bankruptcy court is entitled to considerable deference in its determination that the facts in this case indicate a lack of good faith on the part of the Appellant. The determination in this case did not constitute an abuse of discretion. The bankruptcy court conducted a thorough review of the manner in which the facts conformed to all fourteen of the factors that it looked to in making its determination. The bankruptcy court succinctly summarized the more relevant points when it stated

> [Appellant] stipulated that (1) he decided not to carry medical malpractice insurance because it was too expensive; (2) he has a monthly gross income of $29,500; (3) he has only one major unpaid creditor and has paid and continues to pay all other creditors; (4) he has made no

changes to his lifestyle that might show a willingness to sacrifice in order to fulfill his credit obligations; (5) he filed in response to the Kurily's judgment against him and has no intent to pay them; and (6) he has employed a deliberate and persistent pattern of evading the Kurily's, his single major creditor.

(*See* Bankruptcy Opinion p. 23) These are stipulated facts, which alone, seem sufficient to justify a finding that Appellant lacked good faith in filing his petition. Appellant's own words condemn his actions as an intent to shield his wealth rather than to structure a manner in which to pay off his debts. (*See* Exh. 11 p. 29 (§ 341 Creditor's exam where Appellant states that he has not attempted to pay his debt, has no intention of making such an attempt, and

that he filed his bankruptcy petition in order to avoid paying the judgment against him.)

III.

In *Zick*, the Sixth Circuit noted that the "goals of bankruptcy are to provide an honest debtor with a fresh start and to provide for an equitable distribution to creditors." *Zick*, 931 F.2d at 1128. In the case at bar, the facts support the bankruptcy court's determination that Appellant is not looking for a fresh start, but rather is attempting to gain a head start. The Court finds that the bankruptcy court did not abuse its discretion when it dismissed Appellant's Chapter 7 petition, and the Court **AFFIRMS** the bankruptcy court's order.

SO ORDERED.

/s/ Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Dated: AUG. 13, 1999
Detroit, MI.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: CHRISTOPHER PAUL CASSELL, M.D.
Debtor.
_____/

CHRISTOPHER PAUL CASSELL, M.D.
Plaintiff-Appellant,

v.

PAUL KURILY; DELORES KURILY
Defendants-Appellees.

Case Number: 99-70200

JUDGE PAUL D. BORMAN
UNITED STATES DISTRICT COURT

ORDER AFFIRMING THE BANKRUPTCY JUDGE'S DISMISSAL OF THE CHAPTER 7 PETITION AND BARRING PETITIONER FROM FILING A NEW PETITION WITHIN 180 DAYS.

Before the Court is the Appeal of Christopher Paul Cassell, M.D. from the January 6, 1999 order entered by Bankruptcy Judge Walter Shapero. The Court AFFIRMS Judge Shapero's order which Dismisses with Prejudice Appellant's Chapter 7 petition for bankruptcy, and

BARS Appellant from refiling a new bankruptcy petition for 180 days. The Court will issue an opinion stating its reasons for this Order shortly.

SO ORDERED.

/s/ Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Dated: AUG. 4, 1999
Detroit, MI.

SECTION 109 (11 U.S.C. § 109)

§ 109. Who may be a debtor.

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

(b) A person may be a debtor under chapter 7 of this title only if such person is not-

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a small business investment company licensed by the Small Business Administration under subsection (c) or

(d) of section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act; or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity-

(1) is a municipality;

(2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental

officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5) (A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

(d) Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $269,250[1] and noncontingent, liquidated,

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[1]*[Editors' Note: For cases commenced prior to April 1, 1998, the dollar amount is $250,000.]

secured debts of less than $807,750,[2] or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $269,250* and non-contingent, liquidated, secured debts of less than $807,750** may be a debtor under chapter 13 of this title.

(f) Only a family farmer with regular annual income may be a debtor under chapter 12 of this title.

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending

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[2]**[Editors' Note: For cases commenced prior to April 1, 1998, the dollar amount is $750,000.]

under this title at any time in the preceding 180 days if -

(1) the case was dismissed by the court for willful failure of the debtor, to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

Collier Consumer Bankruptcy Practice Guide, ch. 13 (Matthew Bender).

Collier Family Law and the Bankruptcy Code, chs. 1, 2, 4, and 7 (Matthew Bender).

Collier Bankruptcy Exemption Guide (Matthew Bender).

SECTION 523 (11 U.S.C. § 523)

§ 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

(1) for a tax or a customs duty-

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required-

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by-

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting

the debtor's or an insider's financial condition;

(B) use of a statement in writing-

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of sub-paragraph (A) of this paragraph, consumer debts owed to a single

creditor and aggregating more than $1,075* for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,075* that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable: "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under

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*[*Editors' Note:* For cases commenced prior to April 1, 1998, the dollar amount is $1,000.]

an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act;

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit-

(A) if such debt is not of a kind specified paragraph (2), (4), or (6)** of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual

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** [*Editors' Note:* The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 (effective on October 22, 1994), added paragraph (15) to section 523(a) and amended section 523(c)(1) to include cross references to that paragraph. In conjunction with these amendments, Congress should have amended section 523(a)(3)(A) and (b) to include cross references to paragraph (15); this omission appears inadvertent.]

knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6)** of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or

other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that-

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support:

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty-,

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or

in part by a governmental unit or non-profit institution, or for an obligation to repay funds received as an educational benefit, scholarship or, stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section

727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c (1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured

depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be non-dischargeable pursuant to paragraph (1);

(15) *** not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or

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***[*Editor's Note:* Section 304 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 (effective on October 22, 1994), amended section 523(a) by adding a new paragraph (15). Although Congress intended to add this new paragraph at the end of subsection (a), the language of section 304 of the 1994 Act states that it is to be added at the end of "section 523." The editors have placed paragraph (15) in its intended location in subsection (a), rather than a the end of section 523.]

separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless-

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary, to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental

consequences to a spouse, former spouse, or child of the debtor;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership or in a share of a cooperative housing corporation, but only if such fee or assessment is payable for a period during which-

(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or

(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period, but nothing in this paragraph shall except from dis-

charge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under section 1915(b) or (f) of title 28, or the debtor's status as a prisoner, as defined in section 1915(h) of title 28; or

(18) owed under State law to a State or municipality that is-

(A) in the nature of support, and

(B) enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.).

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c) (1) Except as provided in subsection (a)(3)(B) of this section, the debtor

shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15) as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or

liquidating agent was appointed in time to reasonably comply, or for a Federal depository institution regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees

if special circumstances would make the award unjust.

(e) Any institution-affiliated party of a [*sic*] insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

Legislative History to Section 523

This section specifies which of the debtor's debts are not discharged in a bankruptcy case, and certain procedures for effectuating the section. The provision in Bankruptcy Act section 17c granting the bankruptcy courts jurisdiction to determine dischargeability is deleted as unnecessary, in view of the comprehensive grant of jurisdiction prescribed in proposed 28 U.S.C. § 1471(b), which is adequate to covers

trustee system nationwide, except in the judicial districts in Alabama and North Carolina, added chapter 12, and made the conversion provisions of section 706 applicable in chapter 12 cases.

Selected Case Comment

Effective Date of Conversion. Under section 706(a), the effective date of a conversion from chapter 7 to chapter 13 is the date of the order allowing the conversion, not the date the motion is filed. In re Calder, 973 F.2d 862, 27 C.B.C.2d 1001 (10th Cir. 1992).

Right to Convert Not Absolute. Courts may disallow conversion if a debtor attempts to convert the case for an improper purpose. In re Finney, 992 F.2d 43, 28 C.B.C.2d 1296 (4th Cir. 1993). Accord In re Martin, 880 F.2d 857, 859 (5th Cir. 1989); Martin v. Cox, 213 B.R. 571 (E.D. Ark. 1996); In re Sully, 223 B.R. 582 (Bankr. M.D. Fla. 1998).

Collier References

6 *Collier on Bankruptcy*, ch. 706 (Matthew Bender 15th Ed. Revised).

2 *Collier Bankruptcy Manual*, ch. 706 (Matthew Bender 3d. Ed. Revised).

2 *Collier Bankruptcy Practice Guide*, ch. 37 (Matthew Bender).

SECTION 707 (11 U.S.C. § 707)

§ 707. Dismissal.

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including-

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees or charges required under chapter 123 of title 28; and

(3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may

allow after the filing of the petition commencing such case; the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor

has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

Legislative History to Section 707

This section authorizes the court to dismiss a liquidation case only for cause, such as unreasonable delay by the debtor that is prejudicial to creditors or nonpayment of any fees and charges required under chapter 123 of title 28. These causes are not exhaustive, but merely illustrative. The section does not contemplate, however, that the ability of the debtor to repay his debts in whole or in part constitutes adequate

cause for dismissal. To permit dismissal on that ground would be to enact a non-uniform mandatory chapter 13, in lieu of the remedy of bankruptcy. The Committee has rejected that alternative in the past, and there has not been presented any convincing reason for its enactment in this bill. [Editors' Note: The last sentence is omitted from the Senate Report.]

[House Report No. 95-595, 95th Cong., 1st Sess. 380 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 94 (1978).]

Section 707 of the House amendment indicates that the court may dismiss a case only after notice and a hearing.

2 Collier Bankruptcy Manual, ch. 726 (Matthew Bender 3d. Ed. Revised)

3 Collier Bankruptcy Practice Guide, ch. 51 (Matthew Bender).

SECTION 727 (11 U.S.C. § 727)

§ 727. Discharge.

(a) The court shall grant the debtor a discharge, unless-

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed-

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case-

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph,

any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case-

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a

material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under sections 14,371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under sections 1228 or 1328 of this title, or under sections 660 or 661

of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least-

(A) 100 percent of the allowed unsecured claims in such case; or

(B) (i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date

of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c) (1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if-

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge-

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of-

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

Legislative History to Section 727

This section is the heart of the fresh start provisions of the bankruptcy law. Subsection (a) requires the court to grant a debtor a discharge unless one of eight conditions is met. [*Editors' Note*: The Senate Report lists nine" conditions.] The first condition is that the debtor is not an individual. This is a change from present law, under which corporations and partnerships may be discharged in liquidation cases, though they rarely are. The change in policy will avoid trafficking in corporate shells and in bankrupt partnerships. "Individual" includes a deceased individual, so that if the debtor dies during the bankruptcy case, he will nevertheless be released from his debts, and his estate will not be liable for

them. Creditors will be entitled to only one satisfaction-from the bankruptcy estate and not from the probate estate.

The next three grounds for denial of discharge center on the debtors wrongdoing in or in connection with the bankruptcy case. They are derived from Bankruptcy Act section 14c. If the debtor, with intent to hinder, delay, or defraud his creditors or an officer of the estate, has transferred, removed, destroyed mutilated, or concealed, or has permitted any such action with respect to, property of the debtor within the

Selected Case Comment

Hearing Required . A creditor not given notice of the confirmation hearing is denied due process. Reliable Elec. Co. v. Olson Constr. Co., 726 F.2d 620, 10 C.B.C.2d 759 (10th Cir. 1984).

Objections Permitted. Any creditor may attempt to modify its treatment under the plan by objecting to confirmation. United States v. Victor, 121 F.3d 1383, 38 C.B.C.2d 669 (10th Cir. 1997).

Collier References

7 *Collier on Bankruptcy*, ch. 1128 (Matthew Bender 15th Ed. Revised).

3 *Collier Bankruptcy Manual*, ch. 1128 (Matthew Bender 3d Ed. Revised).

5 *Collier Bankruptcy Practice Guide*, ch. 90 (Matthew Bender).

SECTION 1129 (11 U.S.C. § 1129)

§ 1129. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in

connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5) (A) (i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests-

(A) each holder of a claim or interest of such class-

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests-

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that-

(A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in

section 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive-

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not

exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the

court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(b) (1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on

request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides-

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or

transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such

liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims-

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests-

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the

Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

Legislative History to Section 1129

[*Editors' Note*: The Senate Report throughout refers to section 1130 of the Senate Bill which concerned confirmation of a plan prior to final amendment.]

Subsection (a) enumerates the requirement governing confirmation of a plan. The court is required to confirm a plan if and only if all of the requirements are met.

Paragraph (1) requires that the plan comply with the applicable provisions of chapter 11, such as section 1122 and 1123, governing classification and contents of plan.

Paragraph (2) requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure.

Paragraph (3) requires that the proponent have proposed the plan in good faith, and not by any means forbidden by law.

Paragraph (4) is derived from section 221 of present law. It require that any payment made or promised by the proponent, the debtor, or person issuing securities or acquiring property under the plan, for services or for costs and expenses in, or in connection with, the case or in connection with the plan and incident to the case, be disclosed to the court. In addition, any payment made before confirmation must have been reasonable, and any payment to be fixed

after confirmation must be subject to the approval of the court as reasonable.

a second amended plain fails to establish cause under section 1224. The exception for cause of section 1224 was established to provide aid to the courts when it is not possible to conclude the confirmation hearing within 45 days after the plan is filed. *In re* Ryan, 16 C.B.C.2d 488, 69 B.R. 598 (Bankr. M.D. Fla. 1987).

Collier References

8 *Collier on Bankruptcy*, ch. 1224 (Matthew Bender 15th Ed. Revised).

9 *Collier on Bankruptcy*, ch. 3015 (Matthew Bender 15th Ed. Revised).

3 *Collier Bankruptcy Manual*, ch. 1224 (Matthew Bender 3d Ed. Revised).

Collier Farm Bankruptcy Guide, ch. 4 (Matthew Bender).

SECTION 1225 (11 U.S.C. § 1225)

§ 1225. Confirmation of plan.

(a) Except as provided in subsection (b), the court shall confirm a plan if-

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan-

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b) (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan-

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period, or such longer period as the court may approve under section 1222(c), beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is

received by the debtor and which is not reasonably necessary to be expended-

(A) for the maintenance or support of the debtor or a dependent of the debtor; or

(B) for the payment of expenditures necessary for the continuation, preservation, and operation of the debtor's business.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

Overview

Section 1225 sets out the requirements for confirmation of a chapter 12 plan. Subsection (a) lists six requirements which always apply. The additional requirements in subsection (b) apply only if there is an objection to confirmation of the plan.

Section 1225 is patterned after section 1325 of chapter 13 and does not require acceptance of the plan by unsecured creditors. Rather, the "best interest of creditors" test is applied. Paragraphs (1), (2) and (3) of section 1225(a) require that a plan comply with chapter 12 and other applicable provisions of title 11, that the requisite fees be paid and that the plan be proposed in good faith and not by any means forbidden by law.

Paragraph (4) addresses the treatment of unsecured claimants and paragraph (5) addresses secured claims. Two alternative methods are provided for treating a secured creditor who has not accepted the plan. The plan may provide that (1) the creditor will retain its lien and the value of property to be distributed under the plan will not be less than the allowed amount of the claim or (2) the debtor will surrender the property securing the claim.

Subsection (c) provides authority for the court to order that any entity distributing income to the debtor pay that income to the trustee.

Relation to Other Code Sections

Section 1129 establishes a comparable but far more complex standard for confirming a chapter 11 plan while the

simpler standards under section 1325 are virtually identical to the requirements of section 1225.

Relation to Other Statutes

28 U.S.C. § 586(a) requires that the United States trustee monitor chapter 12 cases and, if appropriate, monitor the plans, appear at hearings and file comments on the plans. Under the 1986 amendments, the judicial districts in Alabama and North Carolina remain outside the United States trustee system.

SECTION 1325 (11 U.S.C. § 1325)

§ 1325. Confirmation of plan.

(a) Except as provided in subsection (b), the court shall confirm a plan if-

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less

than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by, the plan-

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b) (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan-

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended-

(A) for the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)) in an amount not to exceed 15 percent of the gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of

expenditures necessary for the continuation, preservation, and operation of such business.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

Legislative History to Section 1325

The court is required to confirm the plan if six requirements are met. The plan must comply with the provisions of chapter 13 and with other applicable provisions of the bankruptcy code. Fees and charges required under chapter 123 of title 28 to be paid before confirmation must have

Comment on Amendments

1988 Amendments: The Improvements in the Federal Judiciary Act of 1988, Pub. L. No. 100-702 (1988) amended sections 153 and 156 of title 28 to exempt bankruptcy judges and law clerks from the provisions of the Federal Leave Act codified at 5 U.S.C. §§ 6301-6323.

1986 Amendments: The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No., 99-554, 100 Stat. 3008 (Oct. 27, 1986) added subsections (d), (e) and (f) to section 156.

Selected Case Comment

Removal of Deputy Clerk. The appointment and dismissal of deputy clerks are purely administrative matters and the court may not substitute its judgment for that of the bankruptcy court clerk. *In re* Rini, 782 F.2d 603 (6th Cir. 1986).

Collier References

1 *Collier on Bankruptcy*, ch. 2 (Matthew Bender 15th Ed. Revised).

1 *Collier Bankruptcy Manual*, ch. 2 (Matthew Bender 3d Ed. Revised).

28 U.S.C. § 157.

Procedures.

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred 9 under subsection (a) of this section, and may enter appropriate orders

and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to -

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay; (H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeabiity of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court

in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer

a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the

bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

Legislative History to 28 U.S.C. § 157

This section would amend title 28 of the United States Code to clarify that bankruptcy judges may conduct jury trials and enter appropriate orders consistent with those trials if designated by the district court and with the express consent of all parties to the bankruptcy proceeding.

This amendment world clarify a recent Supreme Court decision and resolve conflicting opinions among the different circuits regarding this issue. The Supreme Court in *Granfinanciera, S.A. v.*

Nordberg, 492 U.S. 33 (1989), held that in bankruptcy core proceedings, there is a constitutional right to a trial by jury.

The *Granfinanciera* court had no finding on whether bankruptcy judges could conduct civil trials, and the circuits have reached contrary opinions regarding this issue. Five circuits have held that, in the absence of enabling legislation, bankruptcy judges could not hold jury trials. See *Official Committee of Unsecured Creditors v. Schwartzman (In re Stansbury Poplar Place, Inc.)*, 13 F.3d 122 (4th Cir. 1993); *In re Grabill Corp.*, 987 F.2d 1153, *reh'g en hand denied*, 976 F.2d 1126 (7th Cir. 1992); *Rafoth v. National Union Fire Insurance Co. (In re Baker & Getty Financial Services Inc.*, 954 F.2d 1169 (6th Cir. 1992); *Kaiser*

Steel Corp v. Frates (In re Kaiser Steel Corp.), 911 F.2d 380 (10th Cir. 1990); *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990). The Second Circuit has been the lone circuit to hold that bankruptcy judges have implicit authority to conduct jury trials. *See In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990).

[*140 Cong. Rec. H 10,766* (October 4, 1994).]

JUDICIAL CODE PROVISIONS (TITLE 28, USC) APPLICABLE TO BANKRUPTCY PRACTICE.
Jurisdiction and Procedure
(28 USC §§ 1334, 1408-1412)

28 USC § 1334. Bankruptcy Cases and Proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of

comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the

debtor as of the commencement of such case, and of the property of the estate. (June 25, 1948, ch 646, § 1, 62 Stat. 931; Nov. 6, 1978, P.L. 95-598, Title II, § 238(a), 92 Stat. 2668; July 10, 1984, P.L. 98-353, Title I, § 101(a), 98 Stat. 333; Oct. 27, 1986, P.L. 99-554, Title I, Subtitle C, § 144(e), 100 Stat. 3096; Dec. 1, 1990, P.L. 101-650, Title III, § 309(b), 104 Stat. 5113; Oct. 22, 1994, P.L. 103-394, Title I, § 104(b), 108 Stat. 4109.)

28 USC § 1408. Venue of cases under title 11

Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district-

(1) in which the domicile, residence, principal place of

business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one hundred and eighty day period than the domicile, residence, or principal place of business, in the United States, or

Federal Rules of Bankruptcy Procedure, Rule 8001

Rule 8001. Manner of Taking Appeal; Voluntary Dismissal

(a) Appeal as of right; how taken

An appeal from a judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel as permitted by 28 U.S.C. § 158 (a) (1) or (a) (2) shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. An appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal.

The notice of appeal shall (1) conform substantially to the appropriate Official Form, (2) contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respecti e attorneys, and (3) be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8004.

(b) Appeal by leave; how taken

An appeal from an interlocutory judgment, order, or decree of bankruptcy judge as permitted by 28 U.S.C. § 158(a) (3) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule,

accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

(c) Voluntary dismissal

(1) Before docketing

If an appeal has not been docketed, the appeal may be dismissed by the bankruptcy judge on the filing of a stipulation for dismissal signed by all the parties, or on motion and notice by the appellant.

(2) After docketing

If an appeal has been docketed and the parties to the appeal sign and file with the clerk of the district court or the clerk of the bankruptcy appellate panel an agreement that the appeal be dismissed and pay any court costs or fees that may be due, the clerk of the

district court or the clerk of the bankruptcy appellate panel shall enter an order dismissing the appeal. An appeal may also be dismissed on motion of the appellant on terms and conditions fixed by the district court or bankruptcy appellate panel.

(d) [Abrogated]

(e) Election to have appeal heard by district court instead of bankruptcy appellate panel

An election to have an appeal heard by the district court under 28 U.S.C. § 158(c) (1) may be made only by a statement of election contained in a separate writing filed within the time prescribed by 28 U.S.C. § 158(c) (1).

MI R USDCTED LR 83.50
E.D.Mich. LR 83.50

WEST'S MICHIGAN RULES OF COURT
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
LOCAL RULES FOR CIVIL CASES

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Current with amendments received through 2-1-2000.

LR 83.50 BANKRUPTCY CASES AND PROCEEDINGS

(a) Matters Referred to the Bankruptcy Judges.

(1) Unless withdrawn by a district judge, all cases under Title 11 of the United States Code and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 are referred to the bankruptcy judges. The court intends to give bankruptcy

judges the broadest possible authority to administer cases and proceedings properly within their jurisdiction.

(2) Pursuant to 28 U.S.C. § 157(b)(1), the bankruptcy judges will hear and determine all cases under Title 11 and all core proceedings (including those delineated in 28 U.S.C. § 157(b)(2)) arising under Title 11, or arising in a case under Title 11, and will enter appropriate orders and judgments, subject to review under 28 U.S.C. § 158.

(3) Bankruptcy judges will hear all the non-core proceedings related to a case under Title 11.

(A) By Consent. With the parties' express consent, bankruptcy judges may conduct hearings and enter appropriate orders or judgments in the proceeding,

subject only to review under 28 U.S.C. § 158.

(B) Absent Consent. Absent consent of the parties, bankruptcy judges will conduct hearings and file proposed findings of fact and conclusions of law and a proposed order or judgment with the bankruptcy clerk. Bankruptcy judges may also file recommendations for expedited review. The bankruptcy clerk will immediately serve copies on all parties by mail and enter the date of mailing on the docket. Objections to a bankruptcy judge's proposed findings of fact and conclusions of law must be filed as required by Fed.R.Bankr.P. 9033(b) and (c).

(b) Motion to Withdraw. District judges will hear motions to withdraw cases or proceedings. The district clerk will

serve a copy of the order on the bankruptcy clerk and the bankruptcy judge.

(c) Matters to Be Heard and Determined or Tried by District Judges. District judges will hear and determine cases or proceedings withdrawn pursuant to 28 U.S.C. § 157(d). District judges will also try personal injury tort and wrongful death claims under 28 U.S.C. § 157(b)(5). If necessary, parties may move under (b) to withdraw a personal injury tort or wrongful death claim from a bankruptcy judge.

(d) Filing of Papers.

(1) While cases or proceedings are pending before a bankruptcy judge or before entry of an appeal on the district court docket under Fed.R.Bankr.P. 8007(b), all papers--including removal notices under 28 U.S.C. § 1452(a) and motions to with-

drawal the reference--will be filed with the bankruptcy clerk. If a notice of removal is mistakenly filed with the district clerk, the district clerk will note on the notice the date on which it was received and transmit it to the bankruptcy clerk. It will be deemed filed with the bankruptcy clerk on the date noted.

(2) After a contested matter or proceeding is assigned to a district judge, all papers in the matter or proceeding must bear a civil case number in addition to the bankruptcy case number(s) and must be filed with the district clerk.

(3) With the exception of papers required under Fed.R.Bankr.P. 8006, after the district clerk gives notice of the date on which the appeal was docketed, all papers must bear a civil case number

in addition to the bankruptcy case number(s) and must be filed with the district clerk.

(e) Submitting Papers, Records or Files to the District Court; Assigning District Judges.

(1) The bankruptcy clerk will submit the necessary papers to the district clerk when:

(A) the time for filing objections under Fed.R.Bankr.P. 9033(b) expires;

(B) a district judge enters an order under to 28 U.S.C. § 157(d);

(C) a party files a motion to withdraw a case or proceeding;

(D) a bankruptcy judge determines that a case or proceeding is one in which a personal injury tort or wrongful death claim is to be tried in a district court under 28 U.S.C. § 157(b)(5); or

(E) the record is complete for purposes of appeal under Fed.R.Bankr.P. 8007(b).

(2) In connection with matters other than appeals, the bankruptcy clerk will send a notice to the parties identifying the papers submitted to the district clerk.

(3) The district clerk will assign a civil case number to each matter submitted. The district clerk will assign all cases and proceedings arising out of a bankrupt estate to the district judge to whom the case was first assigned. If there is no prior assignment, the district clerk will assign the matter under LR 83.11.

[Former LR 150.1 effective January 1, 1992; renumbered as LR 83.50 effective March 3, 1997; amended November 2, 1998.]

ADMINISTRATIVE ORDER NO. 96-AO-023. JURY TRIALS IN THE BANKRUPTCY COURT

Pursuant to 28 U.S.C. § 157(e), IT IS ORDERED as follows:

A. The United States District Court for the Eastern District of Michigan hereby specially designates all bankruptcy judges of this district to conduct jury trials, with the express consent of all parties, if the right to jury trial applies in any proceeding that may be heard by a bankruptcy judge.

B. All bankruptcy judges shall adhere to the Jury Selection and Service Act, 28 U.S.C. §§ 1861-1878, and this Court's jury selection plan.

C. Upon request, the Clerk of the District Court shall supply a sufficient number of jurors to the Bankruptcy Court for its scheduled jury trials.

D. The Bankruptcy Clerk shall cooperate with the Clerk of the Court to coordinate juror use with the District Court and to ensure sufficient juror utilization techniques.

E. The Bankruptcy Court shall promulgate a local rule or general order governing procedures in jury cases, including time and form of jury demand, waiver, advisory juries, and trial by consent.

F. The procedure set forth herein shall apply to all bankruptcy cases filed on or after October 22, 1994, and shall remain in effect for two years from the date of this order, unless extended by subsequent administrative order or local rule.

[Filed February 7, 1996.]

U.S. Dist. Ct. Rules E.D.Mich., LR 83.50

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

CHRISTOPHER PAUL CASSELL, M.D.,
Petitioner,

v.

PAUL KURILY; DELORES KURILY,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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*THOMAS J. BUDZYNSKI
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Attorney for Petitioner
Counsel of Record

January, 2001

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(800) 581-2252

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:
CHRISTOPHER PAUL CASSELL, M.D.
Debtor./

Case No. 97-55209-WS
Chapter 7
Hon. Walter Shapero

ORDER GRANTING CREDITORS PAUL AND DOLORES KURILY'S MOTION TO DISMISS WITH PREJUDICE

This matter having come before the Court on Paul and Dolores Kurily's motion to dismiss Debtor's bankruptcy petition with prejudice for lack of good faith pursuant to 11 U.S.C. § 707(a), and the Court having rendered a contemporaneous opinion GRANTING the Kurily's motion,

IT IS HEREBY ORDERED that Debtor's bankruptcy petition is dismissed;

IT IS FURTHER ORDERED that Debtor is barred from refiling for 180 days from the date of this order, unless previous to that time Debtor can bear the burden of proving a substantial change in circumstances.

/s/ Walter Shapero
Walter Shapero
United States Bankruptcy Judge

Dated: JAN 6 1999

cc: David M. Black
Sommers, Schwartz, Silver & Schwartz, P.C.
2000 Town Center, Suite 900
Southfield, MI 48075-1100

Thomas J. Budzynski
Thomas J. Budzynski, P.C.
43777 Groesbeck
Clinton Township, MI 48036

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:
CHRISTOPHER PAUL CASSELL, M.D.
Debtor./

Case No. 97-55209-WS
Chapter 7
Hon. Walter Shapero

ORDER GRANTING CREDITORS PAUL AND DOLORES KURILY'S MOTION TO DISMISS WITH PREJUDICE

I. Introduction

Before the Court is a motion for dismissal of Debtor's Chapter 7 bankruptcy petition. Debtor's principal unsecured creditors are movants Paul and Dolores Kurily, ("the Kurilys") who base their motion on 11 U.S.C. § 707(a). The Kurilys are malpractice judgment creditors and argue that a dismissal for cause and with prejudice is

proper, based on Debtor's lack of good faith. The Court held an evidentiary hearing on this matter. Many of the salient facts were stipulated to incident to or as part of the Joint Final Pre-Trial Order. For the reasons set forth below, the Court grants the motion.

II. Statement of Facts

A. The State Court Judgment

Debtor is a forty-six year old board-certified general surgeon. He has been in private practice for twenty years, the past fifteen as a sole practitioner. He currently has staff privileges at two area hospitals, which means that he is entitled to admit and treat patients there, using hospital operating facilities, and to receive referrals from or consult for other doctors working there. Debtor testified that his patients come pri-

marily from referrals, accounting for roughly 90-95% of his income. The balance comes from being on call to handle emergency surgery. Prior to the malpractice judgment, Debtor was on call at three hospitals. Currently he is on call at one hospital. He clarified that he is not compensated for most on call surgery because those patients often do not have medical insurance. He operates and accounts for his practice on a cash basis. He receives his income from third party payers, usually insurance companies, that reimburse him for his surgical services, in varying amounts over which he has no control.

For approximately two years in 1990 and 1991, Debtor did not carry medical malpractice insurance. He stipulated that his decision not to

carry insurance was because of the high cost. He testified that the medical insurance industry in Michigan at that time was in disarray and $100,000 in coverage cost $40,000 with a $10,000 deductible. During this period, Debtor continued to see and treat patients, Mr. Kurily among them. The Kurilys later sued Debtor for medical malpractice in Macomb County Circuit Court. Prior to trial, Debtor turned down a proposed mediation award of $100,000, which the Kurilys had accepted. The case went to trial and the jury found in favor of the Kurilys for $240,000 on June 25, 1996. When a judgment is greater than the mediation settlement amount, Michigan law allows the prevailing side to seek costs. The Kurilys did so and the state

court awarded costs. Debtor did not appeal the judgment.

To enforce their judgment, the Kurilys served writs of garnishments on certain health insurance companies that reimburse Debtor. On July 17, 1996, roughly $18,310 was collected pursuant to the writs. These funds are presently being held in escrow by the trustee. Debtor testified that the garnishments had an immediate impact on his ability to run his practice, effectively stripping him of any cash flow. On July 29, 1996, Debtor filed his first voluntary petition for relief under Chapter 7.

B. The First Petition for Relief

At the initial § 341 hearing, Debtor testified that he filed in response to the malpractice judgment collection efforts. He fur-

ther stated that he had made no effort to pay the Kurilys and had no intention to do so. During the pendency of his Chapter 7 case, Debtor had testified that he was receiving payments for pre-petition services and was using them to pay for post-petition expenses. He had not claimed accounts receivable from his surgical practice as an asset on his schedules, and thus he had claimed no exemption for them. The Chapter 7 trustee moved for turnover of property of the estate (the accounts receivables and proceeds), on October 11, 1996, and initiated an adversary proceeding against Debtor on this issue on October 25, 1996. The trustee alleged in his complaint that the receivables were property of the estate and requested that the Court compel Debtor to turnover this and

any other non-exempt property. Prior to the hearing on the trustee's motion, (scheduled for November 21, 1996), Debtor filed a notice of conversion from Chapter 7 to Chapter 13, upon which the Court entered an order converting the case on November 4, 1996, thus in effect mooting the trustee's adversary proceeding.

The Kurily's claim was the only unsecured claim of any kind listed in Debtor's Chapter 13 plan. The plan estimated that a total of $21,488 in disposable income over a thirty-six month period would be available to be paid on this claim. The Chapter 13 case was short lived as the Kurilys quickly filed a motion to dismiss the case on eligibility grounds under 11 U.S.C. § 109(e). They alleged that Debtor's non-contingent, liquidated, unse-

cured debts exceeded the statutory limit of $250,000. At that time, with costs, fees and accrued interest, the judgment totaled approximately $375,274. After a hearing, this Court granted the motion to dismiss on December 17, 1996, holding that Debtor was ineligible to be a debtor under Chapter 13. That order was appealed to U.S. District Court for the Eastern District of Michigan, which entered an order affirming the dismissal on April 21, 1997. Debtor had also moved for a stay pending that appeal. During the evidentiary hearing on the stay motion, Debtor again testified about his motive for filing bankruptcy. When asked if he had made any payments to the Kurilys or intended to do so, he answered "No. That's why I filed bankruptcy."

C. The Second Petition for Relief

Debtor filed his second Chapter 7 petition for relief, which is the subject of this opinion, on September 12, 1997. A hearing had been scheduled for September 15, 1997 in state court on the Kurily's motion to add costs to their judgment, filed following the dismissal of the Chapter 13 case. The Kurilys have again moved to dismiss,[1] and the trustee concurs with their motion.

The Kurilys again are the only unsecured creditors of note. Debtor's Schedule F lists two other unsecured claims. An unknown amount is owed GMAC for a"repo deficiency." Debtor testified that GMAC demanded payment of $10,000 after

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[1]In addition, the Kurilys have filed an adversary proceeding contesting the dischargeability of the debt.

selling a Cadillac that he had leased and turned in. There was no testimony or evidence as to a final determination of the amount of this claim. Debtor owes the second creditor, his attorney in the malpractice trial, $5,000. At the hearing, Debtor stated "I think the Kurilys were my only creditor, ever," and he "always" pays his bills as they become due. The parties stipulated that Debtor pays all business bills and credit card debts monthly.

Evidence as to Debtor's interest in real property and any liens against such property is somewhat confusing. Schedule A lists only his home in Grosse Pointe, with a value of $500,000 and a $65,000 secured lien. The house was valued at $508,000 based on a six or seven year old appraisal. Debtor owns that property jointly with his wife

and he claims a $435,000 exemption. The lien is a home equity loan, the proceeds of which were used, in large part, to purchase a condominium in Ann Arbor approximately six to seven years ago. Debtor testified that condominium is worth between $65,000 and $70,000, and was purchased for use by his son while attending the University of Michigan. He further testified that the property is titled solely in his wife's name for estate planning purposes and it is currently being rented to third parties. As there is no mortgage balance on that property, the maintenance fees, upkeep and taxes are paid out of his earnings and the rental income. Debtor continues to pay the home equity loan that funded the purchase at a rate of $1,210 monthly.

Debtor also testified that he and his wife purchased a second condominium about eleven years ago. This property, which he estimated was presently worth $110,000, is located in Grosse Pointe, Michigan, and was purchased to provide a home for Debtor's widowed mother. That property is also titled in his wife's name. The mortgage balance, according to Debtor's testimony, is between $20,000 and $30,000, and he makes the $736 monthly mortgage payment from his earnings.

Debtor lists $313,200 in personal property in Schedule B. The majority of this represents his interest in a 401(k) account that Debtor testified was a qualified profit sharing pension plan. Its value is listed at approximately $285,000 in the schedules, but Debtor testified that it was then

worth about $330,000. Schedule C exempts the listed value of $285,000. Other personalty listed included cash ($100), clothing ($3,000 with a claimed exemption of $3,000), accounts receivable ($20,000 with a claimed exemption for $20,000) and office equipment ($1,000 with a full exemption claimed). Listed as "unknown" were household goods and furnishings (listed in previous schedules as worth $5,000); books, pictures, art, collections; sports and hobby equipment; and inventory.

Prior to this filing, Debtor owned Jeep and Mustang automobiles and leased a Cadillac and a Blazer. Debtor rejected the lease for the Cadillac during the first Chapter 7 case and subsequently sold the Jeep

and Mustang[2]. He replaced these vehicles with a leased BMW and a Mercury Sable. He has reaffirmed the lease on the BMW, for $733 per month, and pre-paid the $9,288 lease for the Sable. According to his testimony, this pre-payment was necessary because the bank denied him financing for the lease. The record is unclear as to what happened to the Blazer, although it does not appear on the schedules incident to the current filing.

The parties stipulated that Debtor failed to list a $500,000 life insurance policy that names his Revocable Living Trust as the

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[2]Debtor had borrowed 80% of the value of the vehicles just prior to the first filing. He testified that the garnishments had left him without any income to continue his practice, and the loans were intended to enable him to keep the business afloat.

beneficiary, and he failed to list any interest in that Trust as an asset in his initial Chapter 7 schedules, although it is not clear what are the assets of that Trust, if any. Debtor testified to this matter during an evidentiary hearing held on January 16, 1997, relating to his motion for stay pending appeal of the dismissal of his first bankruptcy case. He reasoned that, with no value, he did not need to list this asset. Counsel stipulated at that time that the interest was not listed. The life insurance policy and Trust were again absent from the schedules in the instant filing.

The listed Schedule J current monthly expenses are:

Mortgage payment ($1,210 for the home equity loan (for the Ann Arbor condominium) and $736 for his mother's condominium)	$ 1,946
Utilities	$ 561
Home maintenance	$ 250
Food	$ 710
Clothing	$ 400
Medical/dental	$ 300
Transportation	$ 100
Recreation	$ 200
Charitable contributions	$ 700
Insurance (includes $780 for health and disability)	$ 1,367
Taxes including real estate	$ 4,287
Auto installment	$ 738
Office expenses	$17,000
Children's college	$ 500
Total	$29,059

The food budget is for Debtor, his wife and two children. It includes dining out for one meal per week. Debtor testified that he contributes to his church and has been as generous as possible for years. The parties stipulated that

office expenses have remained relatively constant at around $11,000 to $12,000 a month for ten years. Debtor's schedules showed an increase in such from roughly $12,000 to $17,000 from first to second filing. The parties stipulated that Debtor thought the $17,000 figure was a typographical error. There is no detailed listing, as required, in any of the three sets of schedules nor has he amended his schedules to confirm this. Expenses for college decreased from $2,500 per month listed in his prior schedules. Debtor has assisted his children with both undergraduate and graduate education. Currently no child is attending college, but at the May, 1998 hearing, he testified that his youngest child will be in college next year.

The stipulated facts included the fact that Debtor took six vacations trips in 1996, including to Kansas City, Shanty Creek, Idaho and the Cayman Islands. Mrs. Cassell accompanied him for some of these trips. Debtor took similar trips in 1997, including a two-week African safari. Debtor clarified in his testimony that the trip to Kansas City was to visit a brother who was recovering from a heart attack; the Idaho trip was for elk hunting with his daughter; and the African safari cost $4,000 to $5,000, which he said was "surprisingly inexpensive." He also stated that he recently had attended a medical conference in the Cayman Islands for one week, staying a second week for vacation.

At the evidentiary hearing, the evidence consisted of the testimony

of two expert witnesses (one for each side), and Debtor. The expert witnesses testified as to Debtors s income and expenses. The Court initially notes that the parties stipulated that Debtor's gross monthly income from his practice is $29,500. Debtor's witness, Mr. Umlauf analyzed income and expenses for Debtor's practice for the years 1990 through 1997. He used the figures from IRS Schedule C, attached to Debtor's joint federal income tax return. Umlauf did not review any underlying documentation, nor did he compare these expenses with those listed on bankruptcy Schedule J. Umlauf testified that the income came primarily from the surgical practice, with a small amount from interest and dividends. He also stated that Debtor reported rental income from

the Ann Arbor condominium, but testified that the property incurred a net loss, which Debtor paid out of his medical practice earnings. Debtor does all of his own accounting, including preparing his tax returns and withholding employment tax returns covering his staff. Umlauf found him to be "very organized" and "very knowledgeable."

Umlauf calculated that Debtor's weighted average income over the indicated seven year period was $280,000, decreased to about $275,000 when adjusted for tax refunds. He further testified that Debtor's income had been increasing annually to a high of $354,000 in 1995, with a net of $209,000 after business expenses. He noted that the practice income had fallen "dramatically" since then. He theo-

rized that this was a result of a reduction in referrals and a decrease in the amount reimbursed by insurance companies. On cross-examination, the Kurilys noted that Debtor stipulated that he had voluntarily ceased being on call and taking new patients for a period of time, and that this was the cause of the reduction in his income. Debtor testified that the reduction was voluntary and only lasted for about three months. He stated that the reason for his temporary reduction was the stress from trial and he did not believe that it caused the decline in his income, as he is not compensated for most on call surgery. Umlauf calculated that weighted average annual business expenses were $121,000. Umlauf testified that business expenses had been $129,000 in 1996

and $144,500 in 1997. Apparently expenses have increased in recent years because of legal fees in defending the malpractice suit and prosecuting the bankruptcy cases. Umlauf stated that legal expenses were $7,443 in 1996 and $8,093 in 1997. Even at the annual high of $144,500 ($12,042 monthly), these expense numbers show that there likely was a typographical error in Schedule J, and the correct figure for office expenses should be $12,000 monthly and not the $17,000 listed. Thus, Umlauf calculated that Debtor's net weighted average income was $154,000. Umlauf stated that the amount was $155,000, but the Court believes that $154,000 is the correct number ($275,000 income

less $121,000 in business expenses).[3]

The Kurily's expert witness, Mr. Conway, reviewed Debtor's personal and business financial records from approximately 1990 through 1997, including tax returns, bank statements, check registers and canceled checks. He noted two difficulties due to a lack of documentation supporting disbursements: 1) there is no record as to what criteria Debtor

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[3]Umlauf noted that Debtor had been audited by the IRS in 1996. Umlauf testified that the IRS made only minor changes to income and office expenses, and a "substantial adjustment" to rental income from the Grosse Pointe condominium, but did not explain whether the change was up or down. As the IRS did not open up prior or subsequent years for further review, he concluded that the audit was "clean," and characterized the results as a "no change" audit.

used to determine whether any given expense was to be listed as business or personal; and 2) looking only at canceled checks, Conway could not determine whether they were categorized as business or personal. Thus he could make no determination as to the accuracy or legitimacy of expenses. Conway also analyzed Debtor's ongoing financial situation. He examined income and expenses over a three year period to determine if there was "discretionary cash flow," which he defined as income after business expenses and reasonable living expenses. Conway recalculated net income starting with the average amount stated in federal tax Schedule C. He then adjusted this figure upward by adding back in amounts that had been listed as business expenses, but were most likely of a

personal nature[4]. To adjust expenses, Conway started with the listed expenses in bankruptcy Schedule J, and subtracted "discretionary" expenses[5]. Finally, subtracting the adjusted reasonable household expenses from the adjust-

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[4]For example, Conway added in payments to "Bernie's Gems" that were listed as business expenses. He also reduced legal and professional service expenses. As Debtor does his own accounting, most of these expenses would be for legal services. Conway reasoned that once the bankruptcy case and this motion to dismiss are resolved, there should be a reduction in legal expenses.

[5]The majority of the expenses that Conway thought were discretionary were payments for the Ann Arbor condominium (funded by the home equity loan), charity and college. Evidently, Conway was using the schedules from the Chapter 13 case in evaluating expenses. College expenses had been listed at $2,500 monthly. The current Chapter 7 schedules list the much lower amount of $500 per month.

ed net income, Conway concluded that Debtor had discretionary income in the amount of $60,021 per year. Thus, according to his calculations, Debtor could pay all his business expenses, pay his household expenses and still have slightly more than $60,000 per year to spend as he wished.

Shortly before the May, 1998 evidentiary hearing, at the suggestion of the Court, the parties submitted this matter to mediation. The mediation was unsuccessful. As the parties indicated to the Court that they had been pressed for time in the mediation with the evidentiary hearing fast approaching, the Court and the parties thought that further mediation might yet possibly resolve this matter. The Court ordered a second mediation, this time before a Bankruptcy judge, but

that effort also, unfortunately, was unsuccessful. Therefore, the Court was required to and has considered the evidence and reached its conclusion.

III. Discussion

A. Burden of Proof

There was some initial discussion at the evidentiary hearing as to which party bears the ultimate burden of proof in a § 707(a) action. The Court held at that time and affirms that the Debtor has the ultimate burden of proof The Kurilys made out a prima facie case on the pleadings, and especially, the stipulated facts in the Joint Pretrial Order. The Court further held and reaffirms that Debtor has the burden of rebuttal and the ultimate burden of proof *See In re Bingham*, 68 B.R. 933, 935 (Bankr. M.D. Pa. 1987) ("[O]nce the

debtor's good faith has been put into question, the debtor bears the burden of proving that the filing was made in good faith."), *cited with approval in Industrial Ins. Serv. v. Zick (In re Zick)*, 931 F.2d 1124, 1127 (6th Cir. 1991).

B. Dismissal for Cause and the "Smell Test"

A court may dismiss a case under 11 U.S.C. § 707(a) "only after notice and a hearing and only for cause." 11 U.S.C.A. § 707(a) (West 1993). Section 707(a) lists three examples of "cause": unreasonable delay, nonpayment of fees and failure to file schedules and statements. These examples are intended to be non-exclusive illustrations of "cause." *See Zick*, 931 F.2d at 1126. This section differs from § 707(b), which is limited to a motion by the court or trustee

for dismissal for "substantial abuse" by a debtor with primarily consumer debts. Debtor is correct in noting that the two subsections are distinct and the ability to repay debts may constitute substantial abuse under § 707(b), but alone, cannot constitute cause under § 707(a). *See In re Bridges*, 135 B.R. 36, 37-3 8 (Bankr. E.D. Ky. 1991). However, bad faith can constitute cause. *See Zick*, 931 F.2d at 1127.

To determine whether a debtor has acted in bad faith, the *Zick* court relied on what has been termed the "smell test." *Id.* at 1127-28. The smell test is a collection of factors that indicate bad faith, which the Court must review under the totality of the circumstances. *See In re Spagnolia*,

199 B.R. 362, 365 (Bankr. W.D. Ky. 1995). The factors include:

1. The debtor reduced his creditors to a single creditor in the months prior to filing the petition.
2. The debtor failed to make lifestyle adjustments or continued living an expansive or lavish lifestyle.
3. The debtor filed the case in response to a judgment[,] pending litigation, or collection action; there is an intent to avoid a large single debt.
4. The debtor made no effort to repay his debts.
5. The unfairness of the use of Chapter 7.
6. The debtor has sufficient resources to pay his debts.
7. The debtor is paying debts to insiders.
8. The schedules inflate expenses to disguise financial well-being.
9. The debtor transferred assets.
10. The debtor is over-utilizing the protection of the Code to the unconscionable detriment of creditors.
11. The debtor employed a deliberate and persistent pattern of

evading a single major creditor.

12. The debtor failed to make candid and full disclosure.
13. The debts are modest in relation to assets and income.
14. There are multiple bankruptcy filings or other procedural "gymnastics."

Id. at 365 (citations omitted). The *Zick* court further clarified that a

> [d]ismissal based on lack of good faith must be undertaken on an *ad hoc* basis.... It should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence.

Zick, 931 F.2d at 1129 (citation omitted). In *Zick*, the debtor had

intentionally breached a non-competiton agreement. The debtor filed for relief nine days after a consent judgment. The bankruptcy court based its finding of bad faith on the debtor's manipulations in reducing his creditors to a single creditor, his "failure to make significant lifestyle adjustment," his lack of efforts to repay the debt, his filing in response to a mediation award, and the unfairness of the debtor's use of Chapter 7 in these circumstances. *Id.* at 1128. The Sixth Circuit found these factors sufficient to support a finding of bad faith. *Id.*

C. Application of the Zick Factors

The Court finds that Debtor did not sustain the ultimate burden of proof on a number of factors.

1. Reduction of Creditors to Single Creditor

Debtor argues that this factor is inapplicable as he made no efforts to reduce his creditors just prior to filing for bankruptcy. The Court acknowledges that this is true. However, the Court also votes that such efforts were unnecessary because Debtor admittedly had only one creditor: the Kurilys. Debtor testified and stipulated that he has always and continues to pay both his personal and business debts as they become due, except for the Kurilys' judgment. He stated that "I think the Kurilys were my only creditor, ever."

The reason that a debtor paying off certain creditors pre-petition is a badge of bad faith is that by such manipulations, a debtor favors some creditors while disfavoring others. This is contrary to the central premise of bankruptcy - the

orderly and fair distribution of a debtor's assets in a common forum. That is precisely what Debtor has attempted to circumvent. The fact that he had no other creditors to pay off does not negate the result that, by his deliberate pre-petition actions, he has only one creditor that would be affected by his bankruptcy.

2. Continuing a Lavish Lifestyle or Failing to Make Lifestyle Adjustments

There was a fair amount of evidence as to Debtor's lifestyle, and whether or not it was "lavish." Doubtless, for many Chapter 7 debtors appearing before this Court, he has what some may view as an enviable lifestyle. However, for a general surgeon in private practice as a sole practitioner, and as a man who worked throughout his stud-

ies at medical school and who contributes substantially to the support of his widowed mother, the Court is not prepared to call Debtor's lifestyle "lavish," yet the Court's analysis does not end here.

The *Zick* court notes that a debtor's "attempt[] to preserve a comfortable standard of living at the expense of [his] creditors" is not intended to be protected by the Bankruptcy Code. *Zick*, 931 F.2d at 1129 (quoting *In re Jones*, 114 B.R. 917, 926 (Bankr. N.D. Ohio)) (emphasis added). The Code seeks to assist the truly needy. It "'is intended to serve those who, despite their best efforts, find themselves hopelessly adrift in a sea of debt."' *Id.* (quoting *Jones* at 926). It is a badge of bad faith to seek the protection of bankrupt-

cy without being prepared to make some sacrifices. This is supported by the second part of this factor - that the debtor has made no adjustments to his lifestyle. Changes to lifestyle show a willingness to sacrifice in order to fulfill one's credit obligations.

Applied to Debtor, the evidence leaves little room for argument. First and foremost, the parties stipulated that "Dr. Cassell's lifestyle has not changed for the past several years." Testifying at the hearing on his motion to stay pending appeal, Debtor was asked "What have you done to reduce your expenses?" He answered, "I don't remember specifically." It is likely that he could not remember because there had been no reduction. During cross-examination at the evidentiary hearing, Debtor charac-

terized his lifestyle as "frugal" and explained that he had made no effort to reduce his lifestyle because there was "not anything I can reduce." The Court need not, nor is the Court convinced that it ought to, scrutinize individual expenses on Debtor's Schedule J. However, the Court need only look to the stipulated facts to determine that changes in lifestyle were possible: an elk hunting trip in Idaho with his daughter in 1996, an African safari with his brother in 1997 and a recent one-week vacation in the Cayman Islands. His statement that there is nothing he can do to reduce his expenses is at odds with these facts. This indicates a lack of good faith. In a creative argument, Debtor contends that the Kurilys want to preserve their "lavish lifestyle" at

Debtor's expense and characterizes them as "greedy." Not surprisingly, this assertion is unaccompanied by a citation to authority as to the relevance of a creditor's lifestyle in a matter such as this.

3. Filing in Response to Collection Action: Intent to Avoid a Large Single Debt

Stipulated fact (6) states that "Dr. Cassell admits that he filed his first Chapter 7 bankruptcy in response to the Judgment, and that he had made no effort to pay the Kurilys, and had no intention of ever paying them." Stipulated facts (14)(E) and (F) reiterate that Debtor's reason for filing was the Kurily's judgment against him and that he has no intent to pay them. In his testimony at the evidentiary hearing, he was asked three times on cross-examination

whether it was true that he filed in response to the judgment and that he had no intent to pay. He answered "In my opinion they deserve nothing from me." He also answered, "Well, I think that's part of the bankruptcy -- is to avoid paying that."

As noted, after the dismissal of the converted Chapter 13 case, the Kurilys attempted to pursue their rights in state court; they moved to add the costs that they incurred in challenging the bankruptcy petition to their judgment. With a hearing scheduled on Monday, September 15, 1997, Debtor filed his second Chapter 7 on Friday, September 12, 1997. This was clearly another attempt to use bankruptcy to avoid collection action.

4. No Effort Made to Repay the Debt

In his testimony, Debtor asserted that he had made "multiple attempts" to "pay" the debt owed to the Kurily's. Evidently, he was referring to some settlement negotiations in state court that the parties had engaged in. There appears to be no evidence of actual payments other than what emanated from the garnishments. The Kurilys objected that this testimony would be inadmissible as offers to settle under Federal Rule of Evidence 408. The Court sustained their objection and did not allow this testimony.

Debtor also testified that he had made payments to the Chapter 13 trustee during his short-lived Chapter 13 case. The trustee's final report shows a total of $510.00 paid into the plan. This represents two scheduled monthly payments of $255.00. Because the

petition was dismissed before confirmation, no payments were disbursed to creditors and the trustee refunded the $510 to Debtor. The Court questions his good faith here in two respects. First, in closing arguments, counsel for Debtor argued that filing a Chapter 13 petition was an indication of good faith and implied that the only reason for so filing would be because of an intent to pay creditors. However, his motive in converting from Chapter 7 to Chapter 13 raises questions. He converted prior to an evidentiary hearing on the Chapter 7 trustee's motion for immediate turnover of non-exempt assets. The trustee was pursuing the same income, on behalf of the estate, that the Kurilys sought to garnish. Rather than being a serious attempt to make good on his

debt to the Kurilys, his conversion would seem to have been precipitated by the trustee's actions in recovering property of the estate, i.e. the receivables that Debtor earned pre-petition and was using for post-petition expenses. The Court cannot conclude, in light of the timing of the conversion and Debtor's repeated assertions of his intent not to pay, that the Chapter 13 filing indicates his good faith. Second, the Chapter 13 plan called for a total of $21,488 to be paid over three years on the Kurily's claim that, by that time, was estimated to be $375,274. Without more thoroughly analyzing Debtor's disposable income, the Court simply notes that he is willing to give more to charity than to the Kurilys. (At $700 per month, the plan called for a total of $25,200

over the three year period in charitable expenses.) The Court cannot agree with Debtor's assertion that these two payments to the Chapter 13 trustee constituted his best efforts to repay the debt. Although he made a minimal effort to repay the debt, it is so negligible and was likely made under pressure of the trustee's pending actions, as to be no effort in the Court's view.

5. Unfairness of the Use of Chapter 7

Debtor stipulated that his reason for his lack of medical malpractice insurance during the period indicated was the expense. Granted, $40,000 for $90,000 in coverage is expensive. Debtor is a sole practitioner who does his own accounting and tax returns. His own expert witness found him to be

"very organized" and "very knowledgeable." Malpractice insurance is a cost of doing business and Debtor carried it for all but two years. For two years, he made a business decision not to carry such insurance. Just as such insurance is a business expense, so is the debt to the Kurily's, which indeed Debtor himself characterized as a "business expense" that resulted from the operation of his surgical practice. He took a calculated business risk and lost, and incident thereto he turned down a $100,000 mediation figure, and failed to appeal a jury award of $240,000. To be sure, bankruptcy can and is designed to be a haven for those who have made bad or irresponsible business or financial decisions that result in little choice other than bankruptcy. That truism, however, does not

preclude inquiry, in the context of a good faith objection, into the nature and character of the circumstances and decisions that brought a particular debtor to that position.

Bankruptcy is intended to help the honest and needy debtor who has failed in his best efforts to repay his debts. *See Zick*, 931 F.2d at 1129 (citation omitted). This record supports a conclusion that Debtor is using his best efforts to avoid paying this debt and is attempting to make the and virtually only the Kurilys bear the responsibility and consequences of his bad business decisions. In the context of this case, bankruptcy court is not the proper forum for him to contest the justness of the state court jury verdict. He cannot decide for himself that the Kurilys

"deserve nothing from" him. If any facts illustrate an unfair use of Chapter 7, it is these.

6. Sufficient Resources to Pay the Debt

As Debtor correctly notes, the Court must be careful not to rely too heavily on this factor and thus turn a § 707(a) for cause motion into a § 707(b) substantial abuse motion. However, sufficiency of resources is a factor that must be addressed and weighed in balance with all the other factors. The Court concludes that Debtor has not met his burden of proof that he has insufficient resources to pay his debts.

The Kurily's expert witness testified mostly as to expenses. The problem with his analysis is that he was using expenses listed on schedules from the prior Chapter

13 case, and not the current Chapter 7 filing. Debtor's expert testified as to a weighted average income and business expenses, but did not testify as to household expenses. This testimony aside, the parties stipulated that Debtor's monthly gross income from his practice is $29,500. The Court reviewed this and other stipulated facts and Debtor's Schedule J to determine whether there were available resources from net income, after deducting both business and household expenses.

Taking Debtor's Schedule J figures at face value with no adjustments for discretionary or inflated expenses, he has total monthly expenses of $29,059 per month. This figure includes the figure of $17,000 for business expenses that the Court has con-

cluded was a typographical error. There was credible evidence that monthly business expenses, at the highest, are $12,000. The correct total monthly expenses thus should be $24,059. Of this, $12,000 is for business and the balance of $ 2,059 for household expenses. Deducting these expenses from the stipulated gross monthly income would leave $5,441 per month after paying both business and household expenses. This totals $65,292 annually in income after paying business and household expenses.[6] By reason

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[6] $ 29,500 gross monthly income (stipulated)
- 12,000 monthly business expenses
= 17,500 in net income
- 12,059 in household expenses ($24,059 total less $12,000 in business expenses)
= $5,441 balance

thereof, the Court concludes that Debtor has not met his burden of proving that he has insufficient resources to make a good faith effort to pay the Kurilys.

7. Over-Utilization of the Protection of the Code to the Unconscionable Detriment of Creditors

Debtor's argument on this point in essence is that the Kurilys have no need for payment of this debt and will suffer no detriment. He has characterized the Kurilys as "greedy" creditors who wish to "preserve a lavish lifestyle," having won "an oppressive jury verdict" by using the state legal system as a "lottery." Debtor misinterprets the application of this factor.

The unconscionable detriment that the Court must examine is not the impact of non-payment on the

lifestyle of the objecting creditors, but the fact of non-payment itself of a legitimate debt. The fact that Debtor feels that the verdict in favor of the Kurilys was unjust and in his mind the Kurilys "deserve nothing," has no bearing on this Court's determination. The Kurily's lifestyle and their alleged motives also have no bearing on the legitimacy of this debt, which the Court is bound to recognize. The Code is simply not intended to be utilized as a basis for a debtor deciding which creditors "deserve" payment and which do not.

8. Deliberate and Persistent Pattern of Evading a Single Major Creditor

Any argument on this factor must necessarily end with the stipulated fact that "Dr. Cassell has

employed a deliberate and persistent pattern of evading the Kurilys, his single major creditor."

9. Multiple Bankruptcy Filings

Debtor filed a Chapter 7 in July, 1996 in response to garnishments. He converted that to a to Chapter 13 case when faced with the trustee's motion for turnover of assets. The instant case was also apparently in response to anticipated accelerated collection efforts by the Kurilys, made evident when they filed a motion in state court to add costs. These facts indicate, and the Court concludes that this factor weighs against Debtor.

10. Other Factors

The Kurilys argue that other smell test factors indicate bad

faith on the part of Debtor. They allege that he had paid insiders and had transferred assets pre-petition. These allegations relate primarily to ownership of the condominiums. The Cassells purchased the Grosse Pointe condominium approximately eleven years ago in order to provide a home for Debtor's widowed mother. The Court cannot conclude that this indicates bad faith, given the time of the purchase and the purpose. The Cassells purchased the Ann Arbor condominium for their children to use while in college to save rooming expenses. It was titled in Mrs. Cassell's name for estate planning purposes. Although the Court notes that this took place around the same time as when Debtor did not have medical malpractice insurance, there is no indication that this

was an attempt to hide assets for the purpose of a bankruptcy filing years in the future.

The Kurilys also allege that Debtor inflated his expenses and failed to make a full and candid disclosure. The discrepancy as to office expenses appears to be an honest error. The Kurilys allege that Debtor failed to list assets, but he testified that if he did so, it was because he thought they had no value. Although the trustee, not the debtor, should make this determination, the Court is not convinced that what is in this record provides evidence of bad faith.

Debtor's arguments are twofold. First he states that the Kurilys, as creditors and parties in interest, lack standing to bring a motion for substantial abuse, and, further, the debt at issue is

not a consumer debt. Debtor confuses § 707(b) with the motion at issue under § 707(a). The standing and debt requirements that he cites apply to § 707(b), dismissal for substantial abuse, and not § 707(a), dismissal for cause.

Second, Debtor finds support in *In re Zick*. The Sixth Circuit in *Zick* cites three of the smell test factors: "concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence." *Zick*, 931 F.2d at 1129. Debtor seems to reason that, because the debt that he owes the Kurilys stems from his ordinary (and not gross) negligent conduct and would likely be dischargeable

under *Kawaauhau v. Geiger*, ____ U.S.___, 118 S. Ct. 974 (1998), this necessarily means that he has filed in good faith. However, Debtor must first convince the Court that he is eligible for the protections of the Code. In other words, before receiving the benefit of a discharge, the Court must first determine that Debtor has met the fundamental requirement of good faith.

The three factors listed by the court in *Zick* are significant for a finding of bad faith; and were sufficient given the facts in that case. However, the *Zick* court qualified its use of these three factors, stating that dismissal for lack of good faith "is *generally* utilized only in those egregious cases that entail" the three factors. *Zick*, 931 F.2d at 1129 (em-

phasis added). The court did not hold that dismissal based on bad faith was available *only* when the three factors were present. This Court believes that this reading would be contrary to the Sixth Circuit's directive that the Court must examine alleged bad faith under the totality of the circumstances. *See Hardin v. Caldwell (In re Caldwell*, 851 F.2d 852, 860 (6th Cir. 1988) (analyzing a Chapter 13 debtor's good faith). Debtor's lack of concealment or misrepresentation and a debt based on ordinary negligent conduct are sufficiently outweighed by his meeting nine other factors, to wit: manipulation to reduce creditors to a sole creditor, no adjustments in lifestyle, filing in response to collection efforts, no effort to pay, unfairness of his use of Chapter 7, suf-

ficient resources, over utilization of the protection of the Code to the unconscionable detriment of creditors, a deliberate and persistent pattern of evading a single major creditor and multiple filings.

Debtor also cites *Buck v. Buck (In re Buck)*, 166 B.R. 106 (Bankr. M.D. Tenn. 1993) for support of his reading of *Zick* and his argument that facing garnishments for a malpractice judgment is a legitimate reason for filing bankruptcy. In *Buck*, a creditor moved for dismissal for bad faith under § 707(a). The court concluded that "the debtor had legitimate and justifiable reasons for filing Chapter 7, and thus filed in good faith." *Id.* at 110. The court did not apply the smell test factors. Instead, the court applied the

three factors from *Zick*, finding insufficient evidence of misrepresentation, concealment or conduct akin to fraud or gross negligence. Further, the court did not find the debtor's lifestyle to be lavish or expenses excessive. *See Id.* The court did acknowledge evidence of the debtor attempting to avoid a single debt. *See Id.* at 109.

This Court disagrees with the *Buck* court's analysis. The *Buck* court limited its analysis to the three "most egregious" factors stressed by the *Zick* court, and seemed to read *Zick* as limiting bad faith to these three factors. This Court reads the *Zick* court's emphasis on these factors as instructive, but with no intent that they be the exclusive factors for a finding of bad faith. The *Zick* court stated that bad faith dis-

missal is "generally utilized only in those egregious cases." *Zick*, 931 F.2d at 1129. Absent the word "generally," the Court might reach a different conclusion. This Court is not convinced that the Sixth Circuit intended to abandon the smell test in favor of a three-factor test, especially in light of that court's stated approval of the smell test. *See id* at 1127 ("We find particular merit in what is described as the 'smell test'.... ") (citation omitted). Nor does this Court agree that its analysis of good faith must end with a finding of "legitimate and justifiable reasons for filing." *Buck*, 166 B.R. at 110. Again, this would limit the smell test to only one factor. This cannot be squared with what the Court understands is its obligation to methodically

examine a challenged lack of good faith under the totality of the circumstances. The Sixth Circuit has "emphasize[d]... that no list is exhaustive of all the conceivable factors which could be relevant when analyzing a particular debtor's good faith." *Hardin v. Caldwell (In re Caldwell)*, 851 F.2d 852, 860 (6th Cir. 1988) (analyzing a Chapter 13 debtor's good faith). In the instant case, there is significantly more evidence of bad faith, much of it stipulated fact, that would outweigh (under the totality of the circumstances), any lack of evidence of the three factors.

In summary, and restating only the more significant of the myriad of relevant facts, Debtor stipulated that (1) he decided not to carry medical malpractice insurance be-

cause it was too expensive; (2) he has a monthly gross income of $29,500; (3) he has only one major unpaid creditor and has paid and continues to pay all other creditors; (4) he has made no changes to his lifestyle that might show a willingness to sacrifice in order to fulfill his credit obligations; (5) he filed in response to the Kurily's judgment against him and has no intent to pay them; and (6) he has employed a deliberate and persistent pattern of evading the Kurilys, his single major creditor. In addition, the evidence and testimony support the facts that (1) Debtor has sufficient resources to pay, based on stipulated income and expenses according to schedule J; (2) without appealing the Kurily's judgment, he is using bankruptcy as a basis for carrying out his deci-

sion that they deserve nothing from him; (3) his efforts to pay the debt consisted of two Chapter 13 payments, which were so negligible as to be no efforts at all, given his questionable motive and the comparative amounts paid for discretionary expenses; (4) by using the Code, he has been able to avoid the consequences of his business decisions, and instead a legitimate business debt goes unpaid; and (5) he has filed multiple bankruptcy cases, with a strong likelihood, from his testimony, that he will file future petitions in response to collection efforts. The sum total of such compel the Court to conclude that this filing was in bad faith and must be dismissed for cause under 11 U.S.C. § 707(a).

D. Dismissal with Prejudice to Refiling

The Kurilys have requested that the Court dismiss with prejudice. Section 349(a) provides that "[u]nless the court, for cause, orders otherwise, the dismissal of a case under this title does not prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title." 11 U.S.C. § 364(a). A court may, for cause, order that dismissal of a case preclude the debtor from filing subsequent petitions for relief for a set period of time. *See authorities listed in In re Weaver*, 222 B.R. 521, 522 (Bankr. E.D. Va. 1998). Given the facts, particularly Debtor's statements regarding his reason for filing, his statements of his intention not to pay this debt and

his indication that he will respond to future collection efforts by refiling, the Court is convinced that cause exists to impose a bar on refiling.

In effect, Debtor seeks to act as his own state appellate court, having decided that the Kurilys' verdict against him is unfounded and unjust.

> [T]he "[r]equirement of good faith prevents abuse of the bankruptcy process by debtors whose overriding motive is to delay creditors without benefitting them in any way or to achieve reprehensible purposes. Moreover, a good faith standard protects the jurisdictional integrity of the bankruptcy courts by rendering their powerful equitable weapons... available only to those debtors... with 'clean hands."'

In re Casse, 219 B.R. 657, 660-6 1 (Bankr. E.D.N.Y. 1998) (quoting *Little Creek Development Co. v. Commonwealth Mortgage Corp. (In re Little Creek Development Co.)*, 779 F.2d 1068, 1072 (5th Cir. 1986)). Debtor's attempted use of the Code to not just delay payment, but to deny payment altogether is a species of "reprehensible purpose," and bars him from the benefits that good faith brings to a court of equity. Accordingly, the Court will bar refiling for 180 days, unless previous to that time Debtor can bear the burden of proving a substantial change in circumstances. *See In re Dyke*, 58 B.R. 714, 715 (Bankr. N.D. Ill. 1986)[7]

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[7]While mentioned in the recitation of facts in this matter, it should be made clear that the failure of the indicated mediation efforts is

not considered to be of any significance in the Court's conclusion. This would be an inappropriate use of the mediation process. It does, however, give rise to further comment of the Court given the possibility at least of further litigation either in this Court or elsewhere. Both parties in this matter have demonstrated a fair degree of what appears to be illogical intractability, given the high stakes. Debtor has not faced the possibility of this Court's conclusion, which in large measure arises out of the effects of his actions in deciding not to carry medical malpractice insurance and continuing to treat patients, and in not appealing the Kurily's judgment. The Kurilys are not facing the fact that this debt may very well be a dischargeable debt under precedent recently set by the U.S. Supreme Court in Kawaauhau V. Geiger. The Court twice provided the parties with the opportunity to avail themselves of the mediation process. If ever there was a vicious circle, these parties seem to be caught in one, and it likely will not end with this Court's order. It will merely move to another venue where further costly litigation will ensue. Available state court remedies are designed essentially to balance the inescapability of the debt in the

Accordingly, the motion is GRANTED and Debtor's Chapter 7 bankruptcy petition is dismissed with prejudice.

/s/ Walter Shapero
Walter Shapero
United States Bankruptcy Judge

Dated: JAN 6 1999
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state court with Debtor's right and ability to continue to carry on his practice and support his family. At some point (a point this Court believes had been reached some time ago) more rationality than has previously been exhibited might hopefully prevail.